NO. 83-2086 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TALMADGE FRANKLIN FOSTER,

Petitioner

versus

KJELL FILLINGER,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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31PP

QUESTION PRESENTED

The question which Petitioner seeks to present to this Honorable Court is more properly stated as whether the Petitioner, who was injured while working as a "shipfitter" at a land-based operation, but who was covered under the provisions of the Federal Longshoremen's and Harborworkers' Compensation Act (LHWCA) 33 U.S.C. §§901-950, could, in addition to receiving benefits under the Alabama Workmen's Compensation Act, also sue his co-employee for injuries he sustained while working on the job or is such action for damages barred by the exclusivity provisions of LHWCA.

PARTIES TO THE PROCEEDING

The following listed persons have an interest in this case.

1. Talmadge Franklin Foster

2. Kjell Fillinger

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REASONS FOR NOT GRANTING WRIT

The Alabama Supreme Court correctly held that the exclusivity provisions of the Federal act were controlling and that Petitioner's state action for damages against Respondent herein, his co-employee, was barred. The basis of the Court's holding is set forth as follows:

> "We are sensitive to the statement made in *Sun Ship, supra,* that a state may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the LHWCA, but we believe the concurrent jurisdiction for pursuit of benefits

> under a state's workmen's compensation scheme does not include common law suits for damages against co-employees."

Fillinger v. Foster, 448 So.2d 321, 326 (Ala. 1984). See also pages 9a and 10a of Appendix to Petitioner's brief.

The decision of the Alabama Supreme Court which is set forth in Appendix A to Petitioner's Brief [and reported in 448 So.2d 321 (Ala. 1984)] contains a full and complete discussion of the contentions of the parties and correctly sets forth the law applicable thereto.

Respondent asserts that the Supreme Court of Alabama properly held in this case that as a matter of Federal law the Petitioner was absolutely prevented from maintaining his suit for damages against his co-employee in this case due to the preclusion and/or absolute prohibition mandated by 33 U.S.C. § 933(i) as follows:

> "The right to compensation and/or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, and/or to his eligible survivors or legal representatives if he is killed, by the negligence and/or wrong of any other person and/or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer and/or employee of the employer."

The decision of the Alabama Supreme Court fully recognized and followed the holding of this Court in *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 65 L.Ed.2d 458, 100 S. Ct. 2432 (1980) that a state may apply

its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor-workers' Compensation Act (LHWCA), as amended in 1972. In fact, the state did apply its workers' compensation scheme since the Petitioner applied for and received benefits under the Alabama Workers' Compensation Act.

This Court in *Sun Ship, Inc. v. Pennsylvania, supra,* considered only a single question which was stated as follows:

> "The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U.S.C. §§901-950. We hold that it may."

However, the Alabama Supreme Court held in *Foster v. Fillinger, supra,* that common law suits for damages against a co-employee are not part of the Alabama workmen's compensation scheme. (See pages 9a and 10a of Appendix to Petitioner's brief.)

We submit that the Supreme Court of Alabama is the sole arbiter of which state remedies should be considered part of that state's workers' compensation scheme and it has ruled such scheme does not include common law suits for damages against a co-employee. It should be noted that Petitioner failed to argue that specific point in the proceedings below and has failed to address that issue in these proceedings. It is respectfully submitted that such a finding by the Alabama Supreme Court is binding on this Court.

The Alabama Supreme Court's decision did not hold that concurrent jurisdiction did not exist nor did it impose a limit on the scope and application of the LHWCA but rather the Court imposed a limitation on the application and operation of a state-created remedy seeking damages as opposed to benefits under its workmen's compensation scheme.

Furthermore, there is no conflict between the LHWCA and the state workmen's compensation act with respect to benefits. Under Alabama law the right of an injured employee to sue a co-employee for damages does not arise under the Alabama Workmen's Compensation statute but rather is a separate right recognized by common law. *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978). The decision below firmly established that this right is not part of Alabama's workers' compensation scheme.

Petitioner does not controvert the fact that his employer, Kaiser Aluminum & Chemical Sales, Inc. was a covered facility under LHWCA nor that both he and the Respondent were co-employees. Instead, Petitioner seeks the right to reject his rights and remedies under LHWCA and having sought and received benefits under the Alabama Workmen's Compensation law now, in addition, seeks to file a suit for damages under the state common law against his co-employee, the Respondent herein. Thus Petitioner, while arguing the doctrines of concurrent remedies and election of remedies, seeks to unilaterally abrogate the rights of immunity granted co-employees under LHWCA and, in particular, the Respondent herein.

The decision of the Alabama Supreme Court follows the holding of this Court in *Sun Ship, Inc., supra,* and is not inconsistent therewith and for that reason the writ should not be granted.

ARGUMENT

I. THIS ACTION IS BARRED BY THE CO-EMPLOYEE IMMUNITY PROVISION OF 33 U.S.C. §933(i).

The Alabama Supreme Court reaffirmed that the overlap between the LHWCA and State non-damages, compensation *benefits*, allowed by this Court in *Sun Ship*, does not mean, as Petitioner contends, that co-employee *damages* remedies may also be permitted under both Federal and State schemes. The reasons are two-fold: (1) the possibility of an overlap between inconsistent damages remedies was not discussed in any manner or allowed by *Sun Ship*, and (2) there is a clear statement of intended preemption of State law and, in particular, of State law co-employee damages remedies in §933 (i) of the LHWCA which grants co-employee immunity at facilities covered by the LHWCA.

The Alabama Supreme Court has properly rejected Petitioner's contention that Plaintiffs in Alabama may make an election of remedies in favor of State or Federal law - - even inconsistent provisions with respect to co-employee immunity, so that, if the former is chosen, no recourse may be made to the latter, and the co-employee immunity in the latter may be disregarded.

A. THERE IS NO OVERALL CONCURRENT JURISDICTION BETWEEN THE LHWCA AND STATE LAW WHERE FEDERAL RIGHTS TO §933 (i) CO-EMPLOYEE IMMUNITY APPLY.

Although there may be an overlap in benefit levels so that a claimant "will *generally* be able to make up the difference between state and federal *benefit* levels, (*Sun Ship*, *supra*, at 465) (Emphasis added), there is no doubt that this

Court in that decision did not address the possibility of *overall* concurrent jurisdiction between the Federal and State Acts. Clearly, the Court instead allowed concurrent remedies *only* with respect to benefit levels. The definitions in the Act, "benefits" are wholly separate and different from "damages" - - each of which are strictly regulated by the Federal scheme. This contrast between disability "benefits" and "damages" based on tort liability is also recognized at 2 Larson, *Workmen's Compensation Law*, §§ 57.10, 57.11 (1981). It should be noted that the strict definitions of "benefits" and "damages" in the Act are consistent with the most recent United States Supreme Court decision construing the Act which, consistent with the foregoing, also stated a limited definition of "wages" under the Act. See *Morrison-Knudsen Construction Co. v. Director, OWCP,* _____ U.S. _____, 76 L.Ed.2d 194, 103 S. Ct. _____ (1983).

A careful reading of *Sun Ship* shows unquestionably that this Court left open the very question presented in this case: i. e., the extent and operation of partial federal preemption of State co-employee damages actions which conflict with §§ 905 and 933 (i) of the Act. Significantly, *Sun Ship* indicates that, *if necessary*, federal preemption under the LHWCA *may be required* in certain situations. Should this necessity arise, however, the Court has indicated that it would prefer the least restrictive preemption possible - - or partial preemption.

> [W]e observe that if federal preclusion ever need be implied . . . . a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute as Appellant suggests.

Sun Ship, at 465 n.6.

This is precisely the manner of preclusion or preemption which the Alabama Supreme Court recognized: it is *only* the aspect of Alabama common law allowing co-employee damage suits between longshoremen and harborworkers that should be preempted - - a partial preemption rather than preemption of the entire scheme of State compensation damages and benefit law. In fact, no part of the state workmen's compensation scheme was preempted or disturbed, only the separate and distinct right to pursue a common law right against co-employers has been precluded. Section 905(b) of the Federal Act would also allow certain third-party damage actions to remain intact. Thus, this partial preemption is precisely what this Court has indicated it would favor in such a situation "if federal preclusion ever need be implied . . . ." *Id.* at 465. It is also significant to observe that this statement alone, without further elaboration, is evidence of the fact that this Court did indeed foresee that in certain situations federal preemption would be necessary when provisions of the LHWCA were in clear conflict with other laws.

Thus, it is clear that there is no overall concurrent jurisdiction between the Federal and State Act. Instead, the only concurrence which has been allowed is the limited situation involving compensation benefits in which a worker is free to make up the difference between "benefit levels." *Id.* This alone is the holding in *Sun Ship*, and is also the limited ruling in one of the State Court decisions argued by Petitioner, *Umbehagen v. Equitable Equipment Co.*, 329 So.2d 245 (La. App. 1976). The decision in *Umbehagen* merely recognized the overlap in compensation benefit levels. Just as in *Sun Ship*, *Umbehagen* did not involve the question whether a State law co-employee damages action was preempted by the co-employee immunity in §933(i).

B. THERE CAN BE NO ELECTION OF REMEDIES BETWEEN INCONSISTENT PROVISIONS OF THE LHWCA AND STATE LAW.

Petitioner's primary argument to the preemption arguments is that, regardless of the federal statutes, Petitioner had the right to elect his remedies - - i. e., either federal or state." (P. 9, Brief of Petitioner). This election of remedies argument is also the basis or rationale for the other State Court cases on which Petitioner places considerable reliance, *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *Allen v. Keeney*, 442 So.2d 1171 (La. App. I Cir. 1983), and *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983). *Poche* allowed a co-employee damage suit regardless of the Plaintiff's harborworker status, to "a plaintiff who has *elected* to proceed under the Louisiana Workmen's Compensation statute." *Id.* at 1221. (Emphasis added).

However, a Federal Court decision, considering the argument that there could be a binding election of remedies between State workers' compensation laws and the LHWCA, the same argument from *Poche* on which Petitioner relies, found that clearly *this could not be done*. Instead, as the United States Court of Appeals for the Fifth Circuit stated, such an election of remedies was *"irrelevant."*

> [I]t is quite clear that election of remedies is irrelevant in the context of Landry's case; there is no indisputable Texas preclusion of recourse to LHWCA remedies after litigation of a Texas workers' compensation claim, and thus, there is simply no basis for finding an election between mutually exclusive alternatives.

Landry v. Carlson Mooring Service, 643 F.2d 1080, 1087-1088 (5th Cir. 1981). Thus, the Fifth Circuit has removed the entire rationale for *Poche* so that this State Court decision has been, in effect, overruled. Also, as one Texas Appellate Court Judge has observed, the validity of *Poche* can be "disposed of in a single sentence," namely - - "*Poche* reached the Supreme Court of the United States . . . and the appeal was dismissed on October 3, 1977 [citations omitted]." *Johnson v. Texas Employers Insurance Assoc.*, 558 S.W.2d 47, 53 and 53 n. 2 (Tex. Civ. App. 1977) (Keith, J., dissenting).

The *Landry* decision takes on further significance given the statement in *Sun Ship* that "a less disruptive approach would be to pre-empt the state compensation exclusivity clause. . . ." *Sun Ship, supra,* at 465 n. 6. Obviously, this is the same form of exclusivity clause referred to in *Landry*, the absence of which would prevent a binding election of remedies in favor of State law.

The two Louisiana cases cited by Petitioner, *Allen v. Keeney, supra,* and *Beverly v. Action Marine Services, Inc., supra,* both followed and relied on the rationale set forth in *Poche v. Avondale Shipyards, Inc. supra,* which, as the Supreme Court of Alabama pointed out on page 6 of its Opinion, has been severely criticized by the authorities and has been held to be inapplicable in a case involving the LHWCA.

The Louisiana cases further mistakenly base their decisions on the "Twilight Zone" theory. The significance of the Twilight Zone theory has been rendered moot by the 1972 Amendments to the LHWCA. See also generally Gilmore and Black, *The Law of Admiralty*, § § 6-49 et seq. (2d Ed. 1975), *Landry v. Carlson Mooring Service*, 9 BRBS 518 at 520 and

525 (1978) reversed 643 F.2d 1080 (5th Cir. 1981).

Thus, Petitioner's argument presents a contradiction: (a) *Landry* says that unless State law contains a provision which is an "indisputable preclusion of LHWCA remedies," there can be no election of remedies - - but (b) *Sun Ship*, says that one illustration of preferred partial preemption involving LHWCA and State law conflicts would be "to preempt the state compensation exclusivity clause. . . ." *Sun Ship, supra,* at 465 n. 6. The result is that the Supreme Court has already ruled that it would preempt the very exclusivity provision of State law which might otherwise allow Petitioner's asserted justification of an election of remedies in favor of Alabama law. In any event, however, Petitioner's argument is somewhat academic in view of the fact that neither Alabama nor Texas (the State involved in *Landry*), have such a State exclusivity clause. As this Court has observed, "[a]pparently only Nevada's Workmen's Compensation Act contains the unmistakable language" precluding a supplemental award of compensation benefits from another State or federal system. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 65 L.Ed.2d 757, 769 n. 21, 100 S. Ct. 2647 (1980). It should be noted that *Thomas* is additional precedent that rejects the election of remedies rationale in *Poche* by refusing to preclude recourse to District of Columbia compensation benefits where previous Virginia benefits were obtained. *Id.* at 776. Significantly also, the permitted overlap was with *benefits* only, and not with damages which would be in violation of co-employee immunity. This case has added significance since the District of Columbia Act involved in *Thomas* incorporates the LHWCA. D. C. Code §§ 501-502 (1968). See also *Thomas, supra,* at 762 n. 2. A similar election of remedies argument has been rejected in a conflict between the New York Compensation Law and the LHWCA. See *Morris v. Cleanco Industrial Services, Inc.*,

444 N.Y.S. 2d 206 (1981). *Morris* is important since the LHWCA is modelled on the New York Act. 4 Larson, *Workmen's Compensation Law*, §39.10, at p. 16-156 (1973).

C. AS THIS COURT HAS RECOGNIZED IN TRADITIONAL ADMIRALTY CASES, FEDERAL COURT DECISIONS PROVIDE THE APPLICABLE BODY OF LAW CONSTRUING §933(i).

In a case involving a Federal question of the nature presented here, where the result is governed by a Federal statute, the decisions of Federal Courts should be more persuasive and given more weight than the Louisiana State Court decisions argued by Petitioner. The reason for this is that, as the LHWCA makes clear, it was intended to create a *uniform Federal compensation law* which, where applicable, would preempt conflicting State statutes. Thus, for example, in a recent Federal Court decision involving a conflict between certain provisions with respect to damages in the Oregon Employers' Liability Act ("OELA") and the LHWCA, the following statement of the preemptive intent of the LHWCA was made:

> The OELA imposes a stricter standard upon the employer than either general maritime law or Section 905(b) negligence law. Congressional history demonstrates that Section 905(b) [referring to the damages remedies permitted by the LHWCA] was intended to create a *uniform federal law which would preempt conflicting state statutes* [citations omitted].

> Consequently, the OELA does not apply to this action. [Additional citation omitted].

Croshaw v. Koninklijke Nedlloyd, B. V., 398 F. Supp. 1224, 1227 (D. Ore. 1975). (Emphasis added).

Thus, workers' compensation laws of Oregon, Alabama or any other State cannot interfere with the intended uniformity of the LHWCA. It also follows that neither Alabama, Oregon nor any other State law can regulate the standard of care applicable in third-party damage suits under §905(b) or other damages provisions in conflict with the LHWCA. For the same reason, no state law should be permitted to interfere with the co-employee immunity granted in §933 (i) where the LHWCA covers the protected or immunized employees.

The preclusive effect of the LHWCA, and all questions involving construction of the Act, are a matter of Federal law and for that reason it is the Federal Court cases construing the Act and §933 (i) which this Court should follow rather than the Louisiana law Petitioner cites. As the United States Court of Appeals for the Fourth Circuit has observed in a case involving another provision from the LHWCA:

> The legislative history is unambiguous that it is a uniform federal law, *not state law*, to which we must turn. . . .

Duty v. Eastcoast Tender Service, Inc., 660 F.2d 933, 938 (4th Cir. 1981). (Emphasis added). The United States Supreme Court has also recognized this principle - - that the LHWCA involves a special class of workers protected by Federal law so that contrary principles from State law, where there is a conflict, should be disregarded in favor of

the necessity for uniform construction of the Act. See generally *Jones & Laughlin Steel Corp. v. Pfeifer*, _____ U.S. _____, 76 L.Ed.2d 768, 103 S. Ct. 2541 (1983). Thus, in the *Pfeifer* case, because a Federal statute was involved (the LHWCA), the interests of uniformity required that a lower Court be reversed for applying State standards for determining lost earnings in a §905(b) third-party damages action, rather than the uniform Federal standard required by the Act.

> [T]he reasons which may support the adoption of a rule for a State's entire judicial system. . . are not necessarily applicable to the special class of workers covered by this Act.

Pfeifer, supra, at 4802. For that reason, various State law formulas for computing lost earnings were rejected in favor of the uniform Federal standard required in §905(b) of the LHWCA.

It is significant, also, to note in this regard that the enactment of the Longshoremen's and Harborworkers' Compensation Act, and in particular the extensive amendments and re-enactment in 1972, was based upon the Congress' legislative jurisdiction over *admiralty*. This is noted in the legislative history of the 1972 amendments as follows:

> Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty.

Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629, 638 (3rd Cir. 1976). (Quoting House and Senate Report to 1972 amendments to LHWCA). Thus, as a legislative enactment pursuant to the Congress' admiralty power, there can be no doubt that State Courts should apply and recognize the Federal Court decisions defining the preemptive effect of §933(i).

The Court in *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), cert. denied 404 U.S. 1017, 30 L.Ed.2d 665, 92 S. Ct. 679 (1972), faced with the same conflict involved here - - between §933(i) and State law which purported to allow co-employee damages suits, not only disallowed the suit, but went further to observe that such co-employee damages suits had been *abolished*. The following language from this decision is significant:

> Keller's right to sue his employer, its officers and his fellow-employees had not accrued and become vested before it was *abolished* by the limitation of §933(i).
>
> * * *
>
> The limitation contained in §933(i) is in no way violative of the Fifth and Fourteenth Amendments. Since the subsection granting immunity is constitutional, the trial judge was correct in granting a Motion for Summary Judgment in favor of the individual McDermott employees.

Keller, supra, at 1242 (Emphasis added). The *Keller* decision should mean that in this case as well the Plaintiff's co-employee damages cause of action, recognized for the

first time in Alabama in the 1978 decision, *Grantham v. Denke*, Ala., *supra*, had not become vested before it was abolished by the 1927 enactment of the Longshoremen's and Harborworkers' Compensation Act, or the 1972 Amendments to the Act.

See also *Hughes v. Chitty*, 415 F.2d 1150 (5th Cir. 1969) and *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), cert. denied 414 U.S. 1071, 38 L.Ed.2d 477, 94 S. Ct. 584 (1973).

In *Nations, supra*, it was specifically held that (a) between employer and employee, and (b) between co-employees, where there is coverage by the LHWCA, the Act provides the exclusive remedy:

> We are firm in the view that as between employee and employer (or fellow employee) L&H [the LHWCA] is the sole measure and this excludes a land based damage action against the fellow employee.

Nations, supra, at 586. The same result occurred in *Chitty*, where the following holding of a District Court was affirmed:

> The district court dismissed the action against Canulette and Wall on the grounds that Hughes' sole remedy was under the Longshoremen's Act and that this Act grants immunity to fellow employees from damage suits.

Chitty, supra, 1152. In upholding the District Court's decision which considered the same State and Federal law conflict involved here, the Court of Appeals again made very clear that, even if State law purports to allow a co-employee

damage suit, if the defendant-employees are also covered by the LHWCA, they *must receive co-employee immunity* under §933 (i).

> Hughes' exclusive remedy therefore is under the Longshoremen's Act. The district court properly dismissed Canulette and Wall since the Longshoremen's Act grants them immunity from suit.

Id. at 1152. Therefore, inconsistent damages provisions of State law and the LHWCA will not be allowed to co-exist even though, as noted, concurrent compensation "benefits" can do so. It should also be noted that it is irrelevant whether or not the Petitioner in the foregoing cases or this case actually received LHWCA benefits because, where LHWCA coverage exists, supervisory and other fellow employees have a *federally protected right to co-employee immunity* in §933 (i) *regardless* of the decisions of Plaintiffs (or their counsel) with respect to which benefits scheme to pursue first - - State or Federal. *Keller, Nations, Chitty, supra.*

D. PETITIONER'S RELIANCE ON "TWILIGHT ZONE" CASES IS OF NO SIGNIFICANCE.

A few comments should also be made in reply to Petitioner's misplaced reliance on the series of cases, arising prior to the 1972 amendments to the LHWCA, which held that there was a "twilight zone" of maritime but local activity which the LHWCA did not purport to regulate and, for that reason, which State law could cover. These cases cited by Petitioner are *Davis v. Department of Labor,* 317 U.S. 249, 87 L.Ed. 246, 63 S. Ct. 225 (1942) and *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 8 L.Ed.2d 368, 82 S. Ct. 1196 (1962) and *Hahn v. Ross Island Sand & Gravel Co.,* 358 U.S. 272, 79 S. Ct. 266, 3 L.Ed.2d 292

(1959). On the twilight zone doctrine, see generally Gilmore & Black, *The Law of Admiralty, supra.*

Under this law which has been rendered moot by the 1972 amendments to the Act, situations could and frequently did arise where in the twilight zone of maritime but local activity, an election of remedies could be made between potentially overlapping State and Federal compensation law. Thus, for example, a twilight zone employee could make a binding election of remedies in favor of State law which precluded recourse to the LHWCA. This fact situation occurred in the *Landry* decision, cited earlier, at the Benefits Review Board level in which the Board stated:

> We conclude that claimant is barred from relief under the Federal Act by the final judgment and satisfaction of his state claim.
>
> * * *
>
> [W]e conclude that under the doctrine of election of remedies, as well, claimant is barred from relief under the Federal Act by the final judgment and satisfaction of his Texas Act claim.

Landry v. Carlson Mooring Service, 9 BRBS 518, at 520 and 525 (1978), reversed 643 F.2d 1080 (5th Cir. April 27, 1981). As noted previously, however, this result was later reversed by the Fifth Circuit which held such an election of remedies was "irrelevant." *Landry, supra,* at 1087.

Hahn v. Ross Island Sand and Gravel Co., supra, is likewise inapplicable. Not only was this case decided on the Twilight Zone theory, it was based on a specific provision of the LHWCA [33 U.S.C. 903(a)] which was deleted by the

1972 Amendments to the LHWCA. Prior to the 1972 Amendments 33 U.S.C. 903(a) provided that the provisions and coverage of LHWCA did not apply "if recovery for disability and/or death through workmen's compensation proceedings may . . . *validly be provided by state law.*" (Emphasis supplied).

In the *Hahn* case the Court found the exception applied since Hahn's employer had "elected" not to participate in the state Workmen's Compensation Program. However, the provisions relied on by the Court in the *Hahn* case, *supra*, were deleted by the 1972 Amendments, *Director, etc. v. Perini North River Associates*, ___ U.S. ___, 74 L.Ed.2d 465, 103 S. Ct. 634, (1983). The 1972 amendments extended the scope of the LHWCA to cover the workers and the type work which Hahn was performing when injured. The 1972 Amendments eliminated the Twilight Zone theory on which the *Hahn* decision was based by deleting the exception on which the *Hahn* decision was premised. Thus, the decision has no application to the facts of this case. The "election" of remedies rationale in *Hahn*, it should be noted, has also been rejected by the former Fifth Circuit and this Court. See *Landry, supra*, and *Thomas v. Washington Gas Light, supra*.

It is therefore clear that the twilight zone cases relied on by Petitioner have been rendered moot by the decisions in *Landry* and *Sun Ship, supra*. Although an election of remedies was possible at one time for employees within the twilight zone, once the election of remedies possibility has been eliminated, and once the Supreme Court and Fifth Circuit has made clear that LHWCA and State benefits (but not damages) could overlap, this line of twilight zone cases mistakenly relied on by Petitioner are of historical interest only.

Other decisions have recognized that it was the clear intent of the 1972 amendments to the LHWCA for it to move *exclusively* into the twilight zone area. Such a statement clarifying the intent of Congress to give the LHWCA the fullest preclusive effect and inland extension possible in the 1972 amendments is noted as follows:

> In the 1972 amendments, however, Congress abandoned the policy of deferrance to state law-making power. It invaded what had theretofore been the sole preserve of the states by extending the LHWCA's coverage to some part of the domain in which the states could legislate.

Sea-Land Service, Inc., supra, at 636.

Given the foregoing discussion, there should be no doubt that the decision of the Alabama Supreme Court was correct in holding that §933(i) takes precedence over contrary State common law where there is a conflict between the co-employee immunity provisions of the LHWCA and of State law.

CONCLUSION

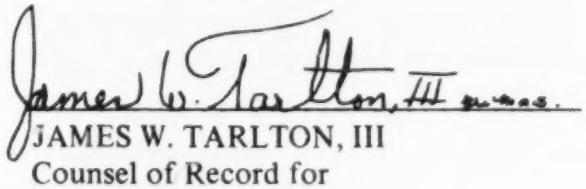
It is respectfully submitted that Petitioner has failed to sustain his burden under Rule 17 to demonstrate why there are special and important reasons why the writ should be granted. The Supreme Court of Alabama did not decide a federal question in conflict with the holding of this Court or any other federal court. The decision fully follows the holding of this Court in *Sun Ship, Inc., supra.* Furthermore, the decision establishes that under Alabama law, common law suits for damages against co-employees are not part of

the Alabama workmen's compensation scheme. Therefore, there is no conflict with the holdings of any other state court since only the Supreme Court of Alabama has the right to declare what Alabama law includes. Furthermore, the suit for damages against a co-employee is contrary to the immunity expressly granted to co-employees by 33 U.S.C. §933(i).

To uphold the position advocated by Petitioner would allow Petitioner to recover benefits under the State Workmen's Compensation Act and then sue a co-employee for damages. Such action for damages would abrogate the immunity granted co-employees under §933(i) LHWCA, would permit double recovery and would undermine the entire purpose of 33 U.S.C. §933(i).

We submit the Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served on James A. Yance, Esquire, Counsel of Record for Petitioner, on the 20th day of July, 1984, by United States Mail, postage prepaid, at his mailing address at Post Office Box 66705, Mobile, Alabama 36660.

James W. Tarlton, III

JAMES W. TARLTON, III